

Subedi (Migration) [2020] AATA 5649 (15 December 2020)

- 1.
- 2.
- 3.

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mr Dilu Subedi
Mrs Ranjita Raut Subedi
Miss Rebecca Subedi
Mr Reuban Subedi

CASE NUMBER: 1834107

DIBP REFERENCE(S): BCC2017/2333656

MEMBER: John Cipolla

DATE: 15 December 2020

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicants Employer Nomination (Permanent) visas.

Statement made on 15 December 2020 at
9:53am

CATCHWORDS

MIGRATION – Employer Nomination (Permanent) visa – Subclass 186 (Employer Nomination Scheme) – temporary residence transition stream – bogus document or false or misleading information – death certificate for child secondary applicant included – department’s integrity check – no explanation for inclusion of death certificate for child who was not dead – no evidence to rebut department’s finding and decision – no compassionate or compelling circumstances justifying grant of visa – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5(1), 65
Migration Regulations 1994 (Cth), r 1.12, Schedule 2, cl 186.213, Schedule 4, criterion 4020(1), (2)

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 5 November 2018 to refuse to grant the applicants Employer Nomination (Permanent) visas under s.65 of the *Migration Act 1958* (the Act). This application was made in the Temporary Residence Transition stream.
5. The applicants applied for the visas on 5 November 2018. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.186.213 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because they did not meet PIC 4020. This requires that there is no evidence that information has been provided during a part 5 reviewable decision such as a bogus document or material that is false or misleading in a material particular.
6. The delegate made reference to the documents provided as a part of the visa application on 30 June 2017, which included the birth certificate of Reuban Subedi, the birth certificate of Rebecca Subedi and the death certificate of Rebecca Subedi. The delegate indicated the Department had undertaken an integrity check of the death certificate for Rebecca Subedi and that the Lalitpur Municipality confirmed that the death certificate was not genuine, owing to an incorrect stamp and incorrect formatting of the document. The delegate further noted that Patan Hospital, in liaison with the Department, had been unable to locate information about either of the two children on their records. Lastly, it was observed by the delegate that the Khairahani Model Village Development Committee's birth certificates from 2014 state that their information is based on Patan Hospital records, whereas Patan Hospital had already confirmed with the Department that that were unable to locate any records concerning the children in question. This was put to the applicant for comment on 16 July 2018 and no response was received. Accordingly, the delegate found that bogus documents had been provided and the application was refused under 186.213. The delegate noted that there was no evidence that had been provided to it addressing waiver of PIC 4020.
7. The primary visa applicant (hereinafter referred to as the applicant) appeared before the Tribunal on 11 November 2020 to give evidence and present arguments.
8. The applicants were represented in relation to the review by their registered migration agent who also attended the review hearing.
9. The Tribunal advised the applicant about the merits review process and made reference to the respective issues in the review. The Tribunal noted that PIC 4020(1) required that there be no evidence that an applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made. The Tribunal also noted that if there were adverse findings made under PIC 4020 that PIC 4020 could be waived in very limited circumstances which were compelling circumstances that affect the interests of Australia or compassionate and compelling circumstances that affect the interests of an Australian citizen, and Australian permanent resident or an eligible New Zealand citizen.
10. The Tribunal noted that the provenance of the death certificate for the applicant's daughter Rebecca had been called into question and that integrity checks undertaken by high commission staff in Nepal found that the death certificate was bogus.

11. The Tribunal advised the applicant that the review before it required the Tribunal to duly consider all of the evidence before the Department, the evidence provided to the Tribunal at review and the oral evidence of the applicant at the review hearing.
12. The Tribunal noted that the death of a child would be the hardest and most difficult thing that a parent would face. The Tribunal noted that in reviewing the material it begged the question as to what would be the objective of a parent providing a bogus death certificate for their child, if their child was in fact not deceased. The Tribunal noted that the grant of a Subclass 186 visa is that the applicant and all migrating members of the applicant's family unit must meet health and character requirements. The law is such that if one member of the family does not meet health requirements then the rule is one fails all fail in the quest to obtain the visas. The Tribunal noted that this provided one possibility as to why someone would submit a bogus death certificate for their child..
13. The Tribunal initially obtained evidence from the applicant about his immigration history to Australia.
14. The applicant advised that he came to Australia in 2009 as the holder of a Student visa, he advised he was a secondary visa holder, and that his ex-wife Prakriti Shrestha, was the primary visa holder. The applicant advised that the marriage between he and his ex-wife broke down because it was an inter-caste marriage and their respective families were not happy with the union.
15. The applicant advised that he had two children, Reuben born on the 4 March 2007, and Rebecca born on 30 May 2008. The applicant advised that these children were from his second wife. The Tribunal questioned the applicant further about this. The applicant advised that he was in a relationship with his second wife at the same time that he was in a relationship with his first wife.
16. The Tribunal noted that if the applicant was in Australia as the holder of a secondary visa, under the umbrella of his first wife's student visa, and he ceased being in a relationship with her he, was then duty bound, to notify the Department of his change of circumstances. The applicant stated that he notified the Department of the cessation of this marital relationship in 2013 and that between 2009 and 2013 he had been in Australia as a secondary visa holder of his first wife's student visa. The applicant advised that his two children to his second wife were both conceived and born overseas in Nepal when he was in a secret relationship with her.
17. The Tribunal noted that it had obtained movement records for his two children which indicated that his son Reuben and daughter had travelled to Australia prior to his daughter's purported death. The Tribunal noted that his two children entered Australia on 29 March 2017 and that his daughter departed Australia on 5 June 2017 and his son on 8 May 2017 almost one month apart.
18. The Tribunal noted that the death certificate in question, stated that Rebecca died on 28 August 2017 some 84 days after returning to Nepal. There was no cause of death noted on the certificate. The Tribunal asked the applicant how his daughter died. The applicant stated that she was killed in a motor bike accident, when she was stuck by the vehicle as a pedestrian. The Tribunal asked the applicant whether he returned to Nepal at the time of his daughter's death. The applicant advised that he had taken leave from his job when his children had visited Australia and that he could not take any more leave. The Tribunal asked whether his wife travelled to Nepal after their daughter's death and he advised that she did not travel as she could not get time off work.

19. The Tribunal asked the applicant who attended to his daughter's death, in the absence of her parents and he advised her maternal grandparents.
20. The Tribunal noted that one of the concerns raised by the Department, with regard to the death certificate that was submitted to the Department, was the fact that it did not make any reference to the cause of death. The applicant was invited to comment on this and he responded that normally a cause of death is not recorded on the death certificate.
21. The Tribunal asked the applicant what happened in his family's culture when someone died. The applicant stated that there were 10-12 days of rituals that are engaged in. The family participate in these death rituals and the deceased is cremated. The Tribunal asked whether his daughter was cremated, and he advised that she was.
22. The Tribunal asked the applicant whether a post-mortem was conducted, given the cause of death, and the applicant advised that it was conducted by a doctor at Patan Hospital in Nepal. The Tribunal stated that if there was a post-mortem conducted that there would have most likely been a post-mortem report and the applicant advised this was the case. The Tribunal asked the applicant whether he could obtain a copy of the post-mortem report from Nepal and he advised that he could. The Tribunal asked the applicant how long this would take to obtain, and the applicant stated about 2-3 weeks.
23. The Tribunal asked the applicant where his son Reuben was residing, and the applicant advised in Nepal with his maternal grandfather.
24. The Tribunal asked the applicant, given that he and his wife were not able to attend their daughter's funeral in Nepal whether their family in Nepal had provided he and his wife with any photos or videos of the funeral or of their daughter's body. The Tribunal noted that as the cause of death was a traumatic accident that a photo may not have been appropriate, but, asked whether any evidence pertaining to their daughter's death had been provided to them. The applicant advised that he and his wife had some photos. The Tribunal suggested that this evidence would be useful to rebut the adverse findings of the Department in relation to the death certificate being bogus.
25. The Tribunal asked the applicant, given the fact that his daughter had died in a pedestrian accident, whether there was any police investigation or report, and the applicant advised that there was, and the Tribunal suggested it would be useful for the applicant to approach the relevant authorities in Nepal to obtain a copy of the report.
26. At the conclusion of the hearing the Tribunal stated that as discussed, the evidence collated by the Department, indicated that the death certificate pertaining to his daughter Rebecca was determined by the authorities in Nepal to be bogus. The Tribunal advised that it would have expected, given the applicant was represented by a migration agent that evidence rebutting the findings of the Department would have been provided at review. The Tribunal noted that nothing at all had been provided.
27. The Tribunal advised the applicant that he should collate evidence of the coronial inquest and evidence of the police investigation into his daughter's death, along with photographic evidence if he deemed it appropriate to tender it to the Tribunal. The Tribunal advised the applicant that he could have a month to provide this information. The Tribunal also noted that given the current global pandemic that if he required any additional time to provide this evidence, he could contact the relevant Tribunal officer and the Tribunal would be receptive to an extension of the time.
28. On 7 December 2020 the Tribunal received the following information from the applicant's representative advising that:

29. Unfortunately, Mr Dilu Subedi has not been able to obtain evidence that you have requested from the hearing incurred in (sic) 11 November 2020. From hearing, we have agreed to provide necessary evidence in support of the application within a month. Mr Dilu said he could not obtain any evidences that we discussed during hearing.

30. The applicant has been made aware of the possible consequences and the effects of PIC 4020. Please make your decision on the documents you have at present.

31. No submissions were made to the Department at primary stage or to the Tribunal at merits review addressing waiver of PIC 4020.
32. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

33. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.186.213 for the grant of the visa. Broadly speaking, this requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
34. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

35. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

36. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
37. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
38. The applicant lodged his Subclass 186 visa application on 30 June 2017. In support of the application the applicant provided birth certificates for his two children Reuben and Rebecca, along with documents that contained their dates of birth and which were issued on 20 April 2014. The applicant also provided a death certificate for his daughter Rebecca, which is dated 17 September 2017, showing a date of death of 28 August 2017.
39. Departmental officers decided to undertake integrity checks to verify the authenticity of the two birth certificates and the death certificate.
40. As a result of these integrity checks the Department was advised that “the Lalitpur Municipality confirmed that the death certificate of SUBEDI Rebecca is not a genuine document as the stamp (seal) and the format of the document are not correct. The Patan Hospital has confirmed that they have been unable to locate any information about SUBEDI Rebecca and SUBEDI Reuben in their birth record system. Khairahani Model Village Development Committee’s birth certificates from 2014 state that their information is based on Patan Hospital records whereas Patan Hospital has confirmed they couldn’t find any records for Rebecca or Reuben in their birth record system.”
41. On 16 July 2018, the Department sent the applicant a natural justice letter to comment on the result of these integrity checks. The applicant did not respond.
42. The Tribunal notes that the applicant was represented in these proceedings by a registered migration agent. The issue in the review was clear and the applicant when lodging his application for review annexed a copy of the Departmental decision to the review application.
43. The Tribunal expected in a review of this nature, raising issues around the authenticity of documents, that the applicant, through his representative, would have provided evidence to the Tribunal at merits review to rebut the findings of the Departmental delegate, but no such information has been provided, indeed since the hearing no such information has been forthcoming. This is despite the Tribunal spelling out the types of evidence that the applicant could provide that would negate the findings of the Department. Further to this no submissions were made to the delegate or the Tribunal at review addressing waiver of PIC 4020.
44. The Tribunal has hypothesised, as discussed with the applicant at hearing, why any parent would submit a death certificate for a child, if their child was in fact not deceased, noting that the death of a child would be the hardest and most difficult event a parent would have to endure. The Tribunal as discussed with the applicant, noted at hearing that the only possible explanation it could conceive of was that Rebecca suffered with a health condition, which meant she would not meet the health and public interest criteria relevant to the grant of the visa. The Tribunal noted that if this was the case the applicant would not be granted a visa, as the law was such that if one fails the health criteria, all fail.

45. The Tribunal in the absence of any evidence provided in advance of the hearing to rebut the Departmental findings, attempted to adduce evidence from the applicant about his daughter's death, the circumstances that led to a premature death at the age of 9, and eliciting evidence corroborative of the death in the face of these adverse findings made about the death certificate.
46. The Tribunal gave the applicant one month from the hearing date to provide this evidence and as has been noted suggested the types of evidence the applicant could submit to rebut the findings of the Departmental delegate.
47. Given the fact that these documents would have to be accessed from Nepal, the Tribunal considered that a month to provide them was reasonable, however due to the prevailing global circumstances caused by COVID 19, the Tribunal advised the applicant that it was receptive to a further of extension of time if there were any difficulties obtaining the documents and photographs.
48. As has been noted above on 7 December 2020 the applicant's representative advised the Tribunal that "Unfortunately, Mr Dilu Subedi has not been able to obtain evidence that you have requested from the hearing incurred in 11 November 2020. From hearing, we have agreed to provide necessary evidence in support of the application within a month. Mr Dilu said he could not obtain any evidences that we discussed during hearing. The applicant has been made aware of the possible consequences and the effects of PIC 4020. Please make your decision on the documents you have at present."
49. The evidence that the Tribunal is left with is the evidence collated by the Department as a result of their integrity checks and that is that the death certificate provided by the applicant with his Subclass 186 visa application is a bogus document.
50. There is evidence before the Tribunal that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth: a 'bogus document', as defined in s.5(1), i.e. a document that the Tribunal reasonably suspects is a document that: purports to have been, but was not, issued in respect of the person, or is counterfeit or has been altered by a person who does not have authority to do so, or was obtained because of a false or misleading statement, whether or not made knowingly.
51. Therefore, the applicant does not meet PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

52. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
53. There is no evidence before the Tribunal that the applicant or any member of the family unit (as defined in r.1.12) has been refused a visa in the relevant period because of a failure to satisfy PIC 4020(1)
54. Therefore, PIC 4020(2) is met.

Should the requirements of PIC 4020(1) or (2) be waived?

55. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
56. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
57. For the following reasons, the Tribunal is satisfied that the requirements should be waived.
58. No evidence has been provided to the delegate at primary stage or to the Tribunal at review addressing the waiver of PIC 4020 due to the existence of compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, that justify the granting of the visa.
59. Therefore there is no evidence before the Tribunal which could lead to a finding that the requirements of PIC 4020(1) should be waived.

Has the applicant satisfied the identity requirements?

60. Clause 4020(2A) requires an applicant to satisfy the Tribunal as to his or her identity. No question has been raised as to the applicant's identity and based on the material, including a copy of the applicant's passport, the Tribunal is satisfied as to the applicant's identity.
61. Therefore, the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy cl.4020(2A)?

62. Clause 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2BA).
63. There is no evidence that the applicant or any member of the applicant's family unit have previously been refused a visa because of a failure to satisfy PIC 4020(2A). Therefore, PIC 4020(2B) is met.
64. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.186.213.

DECISION

65. The Tribunal affirms the decision not to grant the applicant's Employer Nomination (Permanent) visas.

John Cipolla
Senior Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...